84-1546

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

KENNETH McGINNIS and NEIL F. HARTIGAN,

Petitioners,

vs.

ALAN D. ROBINSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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HHP

QUESTION PRESENTED FOR REVIEW

Did the courts below fail to apply the presumption of correctness required by 28 U.S.C. § 2254(d) to the Illinois appellate court's finding of fact that it was respondent who was filmed on videotape by a concealed camera during a drug sale, where proper application of the presumption would have led to a finding that the constitutional errors were harmless beyond a reasonable doubt.

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In The

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KENNETH McGINNIS and NEIL F. HARTIGAN,

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vs.

ALAN D. ROBINSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The order of the United States Court of Appeals for the Seventh Circuit is unpublished pursuant to Circuit Rule 35. A copy of the order is attached to this petition as Appendix A. The order of the United States District Court for the Central District of Illinois is reported at *United States ex rel. Robinson v. McGinnis*, 593 F. Supp. 175 (C.D. Ill. 1984). A copy of the order is attached to this petition as Appendix B.

JURISDICTION

The court of appeals on January 14, 1985, affirmed the district court's grant of respondent's application for a writ of habeas corpus. Petitioners' timely filed petition for rehearing and suggestion for rehearing en banc was denied on February 11, 1985 (Appendix C). On February 28, 1985, the court denied petitioners' Motion to Recall Mandate and Stay Issuance of the Mandate Pending the Filing of a Petition for Writ of Certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 2254

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceedings, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

A. State Court Proceedings.

Respondent, Alan D. Robinson, on January 8, 1980, was charged by information filed by the Knox County Illinois State's Attorney with the offense of unlawful delivery of a controlled substance in that on November 13, 1979, he knowingly and unlawfully delivered to Ronald Guerrero 30 grams or more of a substance containing cocaine in violation of Ill. Rev. Stat. ch. 56½, § 1401(a)(2). On July 7, 1980, a pretrial discovery order was entered by the circuit court, which provided in part:

> On or before August 5, 1980, the defendant is to disclose to the People the following:
>
> 1. The names and last known addresses of persons whom the defendant intends to call as witnesses together with their relevant written or recorded statements both containing substantially verbatim reports of their oral statements, and a list of memorandum reporting or summarizing their oral statements.
>
> 2. Any and all defenses which the defendant intends to make at the hearing or trial.
>
> * * *
>
> 6. If the defendant intends to prove an alibi, specific information as to the place where he maintains he was at the time of the alleged offense.

Respondent filed, on October 3, 1980, a discovery response which stated in part:

> 1. Defendant claims he is not guilty and his defenses are as follows:
>
> a. Not guilty beyond a reasonable doubt.

b. The Defendant was, at the time of the alleged offense herein, at the following location:

Peoria, Illinois

c. The names and last known addresses of persons the Defendant intends to call as witnesses:

1. Thomas B. Estep, Jr., Department of Law Enforcement, Springfield, Illinois. Prior criminal convictions are unknown, memoranda and reports already available to State.

2. Mr. Gill, Western Illinois University, Macomb, Illinois.

3. Mr. John Stringer, 444 South Stewart Robert, Creve Coeur.

The proof of service indicated that respondent's discovery response was served on the Knox County State's Attorney on October 3, 1980, at 3:00 p.m.

On the day of trial, October 6, 1980, defense counsel sought to amend the discovery response to indicate respondent was in Creve Coeur, Illinois, not Peoria, Illinois, at the time of the offense. Counsel further advised the court that "the defendant will testify . . . that he was, on November 13th, 1979 at . . . 10:30 P.M. in the presence of Jim Henderson in Peoria, and that he was in the presence of Mr. John Stringer of Creve Coeur, Illinois at 11:00 P.M." The prosecution made a motion in limine to exclude an alibi defense and the court granted the motion by stating: "I think if an alibi defense was going to be used it should have been—even though the names of the individuals are not known, I think the fact should have been stated."

Following the empanelling of the jury, opening statements were made, the State called its first witnesses, and the court recessed until October 7, 1980. On October

7, 1980, the case was continued until October 14, 1980, because respondent was involved in an automobile accident.

On October 10, 1980, respondent filed a Motion to Reinstate wherein he moved for leave to prove an alibi defense and to call witnesses identified on the notice of alibi defense attached to the motion. The Notice of Alibi Defense disclosed that:

> 1. On November 13, 1979, at the time of the alleged offense herein, the Defendant was at the following location: Creve Couer, [sic] Illinois.
>
> 2. The names and last known addresses of persons the Defendant intends to call as witnesses in order to prove this Alibi Defense are:
>
> a. Jim Henderson, Room 35, Siesta Motel, Canton, Illinois.
>
> b. John Stringer, 445 S. Stewart, Creve Couer, [sic] Illinois.

The proof of service disclosed that the Motion to Reinstate and the Notice of Alibi were served on the Knox County State's Attorney at 4:00 p.m. on October 10, 1980.

On October 14, 1980, the trial reconvened. After argument on respondent's Motion to Reinstate the alibi defense, the court denied the motion stating:

> I am going to deny the motion. It was made on Friday [October 10, 1980] at 4:00 p.m. I think it comes too late again, and yesterday, Monday, was a holiday, Columbus Day, so had the motion been filed or made at the beginning of the continuance I might have considered it.

As part of the State's case in chief, Ronald Guerrero testified that he had arranged to purchase cocaine from respondent on November 13, 1979. Guerrero informed

Dick Flanagan, an agent with the Department of Criminal Investigation, of the purchase. On November 13, 1979, respondent arrived at Guerrero's residence between 10:30 and 11:00 p.m. Guerrero testified that when respondent "came into the kitchen he pulled a bag out and showed it to me and I looked at it . . . and I handed him the money and he did some figuring on how much it was going to be and how much I was getting back and he counted the money and left." Guerrero testified he paid respondent $2,925 from the $3,000 he received from Dick Flanagan. The transaction occurred in the kitchen and lasted twenty minutes.

Kerry Galloway, an agent with the Illinois Department of Law Enforcement, Division of Criminal Investigation, testified that on November 13, 1979, he installed a video camera in the residence of Ronald Guerrero at 1362 Monroe Street in Galesburg. The camera was placed on a shelf in the living room in the direction of the counter in the kitchen. A video monitor and video recorder were placed in the garage. The equipment was installed with Ronald Guerrero's permission. Galloway identified Plaintiff's Exhibit 2 as the videotape that was made on the night of November 13, 1979 at Guerrero's residence. Galloway identified respondent as the subject he observed while viewing the video monitor in the garage.

Michael Townsend, special agent with the Illinois Division of Criminal Investigation, testified that on November 13, 1979, he was present in Ronald Guerrero's house with agent Galloway and Guerrero. He viewed a video monitor in the garage from "about 11:30 p.m. till 10 minutes to midnight" with agent Galloway. While viewing the monitor, he viewed respondent and Guerrero enter the kitchen. Respondent placed a brown bag on the kitchen counter

and Guerrero opened the bag and removed a plastic baggie containing a white powder substance. Guerrero removed money from his shirt pocket and gave the money to respondent.

A forensic scientist with the Illinois Department of Law Enforcement, Steven Hampton, testified that he analyzed the substance purchased by Guerrero from respondent. In his opinion the substance was cocaine and weighed 41.6 grams.

At the conclusion of the State's case in chief respondent presented his defense. Cecil McDougall, employed by the State of Illinois crime laboratory in Springfield, Illinois, testified that he conducted a fingerprint comparison between a document containing unknown fingerprints and a document containing respondent's fingerprints. The document containing the unknown fingerprints was obtained from Guerrero on November 13, 1979 at his residence. As a result of the comparison, McDougall could not identify any fingerprints on the unknown document as respondent's fingerprints. However, respondent could have handled the document and not left fingerprints.

Thomas Estep, a document examiner with the Illinois Department of Law Enforcement, testified he made a comparison between a questioned document containing handwriting and a known document which contained respondent's handwriting. The questioned document was the same document examined by Cecil McDougall. Based upon his examination, "the questioned writing was too limited to make any determination whether Alan Robinson wrote the questioned exhibit." Estep testified that there was distortion in the known handwriting of respondent in that "throughout much of the known writing it was slowly written and rather unnatural in appearance." From this

observation, the witness concluded that "the known writing was indicating possible distortion of the writer's natural writing habits."

Respondent, testifying on his own behalf, denied ever possessing cocaine while with Guerrero or delivering cocaine to him. Respondent specifically denied being with Guerrero at 1362 Monroe Street in Galesburg on November 13 or 14, 1979. Respondent stated he did not appear on the videotape played to the jury. The State objected when respondent sought to testify to where he was on November 13, 1979. The court sustained the objection and refused to allow respondent to testify that he was in Creve Coeur, Illinois, at the time of the offense. Respondent was allowed to testify that he was not at the crime scene.

Following deliberations by the jury, a verdict of guilty was returned. A judgment of conviction was entered and the court sentenced respondent to twenty years imprisonment.

From a judgment of conviction, respondent appealed to the Illinois Appellate Court, Third District. The court affirmed the conviction. *People v. Robinson*, 104 Ill. App. 3d 20, 432 N.E.2d 340 (3d Dist. 1982). The Illinois appellate court made the following findings with respect to the issue of respondent's identification:

> Ronald Guerrero had been arrested on November 6, 1979, for selling ½ gram of cocaine, and he offered to assist the police in return for leniency. The delivery was made by Robinson on November 13, 1979, to Guerrero in his home in Galesburg, Illinois, and was filmed on videotape by a camera previously installed by the police with Guerrero's consent. The camera was placed upon a living room shelf pointing towards the kitchen. The film showed defendant prim-

> arily in profile, giving Guerrero a bag in exchange for money. The price was $1,950 per ounce. During the transaction, defendant stated that he might be able to get some more. . . .

Id. at 22, 432 N.E.2d at 343.

B. Federal Court Proceedings.

Upon exhausting state court remedies, respondent filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Central District of Illinois. On August 20, 1984, the district court granted respondent's application for habeas corpus relief. The district court ordered that respondent be discharged unless respondent is retried within 120 days. Petitioners appealed from the grant of the writ to the United States Court of Appeals for the Seventh Circuit. The court on January 14, 1985, affirmed the judgment of the district court in an unpublished order. Petitioners filed on January 28, 1985, a Petition For Rehearing and Suggestion For Rehearing En Banc. The court on February 11, 1985 denied the petition for rehearing.

REASONS FOR GRANTING CERTIORARI

THE COURTS BELOW FAILED TO APPLY THE PRESUMPTION OF CORRECTNESS REQUIRED BY 28 U.S.C. § 2254(d) TO THE ILLINOIS APPELLATE COURT'S FINDING OF FACT THAT IT WAS RESPONDENT WHO WAS FILMED ON VIDEOTAPE BY A CONCEALED CAMERA DURING A DRUG SALE, WHERE PROPER APPLICATION OF THE PRESUMPTION WOULD HAVE LED TO A FINDING THAT THE CONSTITUTIONAL ERRORS WERE HARMLESS BEYOND A REASONABLE DOUBT.

The Seventh Circuit's order affirming the district court's grant of the petition for writ of habeas corpus represents an erosion of this Court's holding in *Sumner v. Mata*, 455 U.S. 591 (1982). In *Sumner*, this Court held that the federal courts in habeas corpus proceedings must "show a high measure of deference to the fact findings made by state courts." *Id.* at 598. This holding was a reaffirmance of the position taken by this Court in *Sumner v. Mata*, 449 U.S. 552 (1981).

This Court's decisions in *Sumner v. Mata* were intended to provide guidance to the lower federal courts as to how the courts should implement the provisions of 28 U.S.C. § 2254(d), which provides in part:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue made by a State court of competent jurisdiction . . . evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct. . . .

This standard has been reaffirmed by this Court in *Marshall v. Lonberger*, 459 U.S. 422 (1983), *Maggio v. Fulford*,

462 U.S. 111 (1983), *Rushen v. Spain*, ___ U.S. ___, 104 S.Ct. 453 (1983), and most recently in *Wainwright v. Witt*, ___ U.S. ___, 105 S.Ct. 844 (1985).

In this case, the Illinois appellate court on direct appeal made the following findings of fact with respect to the issue of respondent's identification, all of which are entitled to section 2254(d)'s presumption of correctness:

> Ronald Guerrero had been arrested on November 6, 1979, for selling ½ gram of cocaine, and he offered to assist the police in return for leniency. The delivery was made by Robinson on November 13, 1979, to Guerrero in his home in Galesburg, Illinois, and was filmed on videotape by a camera previously installed by the police with Guerrero's consent. The camera was placed upon a living room shelf pointing towards the kitchen. The film showed defendant primarily in profile, giving Guerrero a bag in exchange for money. The price was $1,950 per ounce. During the transaction, defendant stated that he might be able to get some more. . . .

People v. Robinson, 104 Ill. App. 3d 20, 22, 432 N.E.2d 340, 343 (3d Dist. 1982).

"Section 2254(d) by its terms . . . applies to factual determinations made by state courts, whether the court be a trial court or an appellate court." *Sumner v. Mata*, 449 U.S. 539, 547 (1981). Consequently, the finding of fact that respondent was filmed in Guerrero's residence giving Guerrero a bag in exchange for money should have ended the matter and resulted in the denial of respondent's application for a writ of habeas corpus. Nevertheless, despite the statutory language and this Court's interpretation thereof, the United States District Court for the Central District of Illinois ignored the Illinois court's findings of fact and substituted its findings for those of the state court:

> This court has reviewed the videotape and finds that standing alone, the tape is not conclusive that Alan D. Robinson is the person shown on the tape. In fact, without corroborating testimony from other witnesses it would be impossible to conclude that the person seen in the videotape was the petitioner, Alan D. Robinson.

United States ex rel. Robinson v. McGinnis, 593 F. Supp. 175, 184 (C.D. Ill. 1984).

The district court's disregard for section 2254(d) was not rectified by the court of appeals. Indeed, it is evident from the court of appeals' order that that court too failed to show the requisite measure of deference to the fact findings made by the Illinois appellate court, and did not apply the presumption of correctness which is mandated by the statute. Indeed, the court's order does not refer to section 2254(d) or give any other indication that section 2254(d) was considered:

> The exclusion of Robinson's alibi defense at trial violated his right under the fifth, sixth and fourteenth amendments to testify on his own behalf. There is no evidence that Robinson suppressed his alibi evidence during pretrial discovery to obtain any tactical advantage. Even if the presentation of Robinson's alibi defense was a surprise to the state, the trial court could have granted a continuance to enable the state to investigate the alibi. Preclusion was an inappropriate remedy in this case. *Alicea v. Gagnon*, 675 F.2d 913, 924 (7th Cir. 1982). Since there is a reasonable possibility that the trial court's ruling affected the jury's verdict, it cannot be deemed harmless error. *Allison v. Gray*, 603 F.2d 633, 634 (7th Cir. 1979).

(Appendix A at 1-2) This failure is clearly at odds with this Court's pronouncement that "[w]hen Congress provided in § 2254(d) that a habeas court could *not* dispense

with the 'presumption of correctness' embodied therein unless it concluded that the factual determinations were not supported by the record, it contemplated at least some reasoned written references to § 2254(d) and the state-court findings." *Sumner v. Mata*, 449 U.S. 539, 549 (1981) (emphasis in original). As important, this Court further held in that case that "[i]n order to ensure that this mandate of Congress is enforced . . . a habeas court should include in its opinion granting the writ the reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was 'not fairly supported by the record.' " *Id.* at 551.

It is clear that the Court of Appeals for the Seventh Circuit failed to observe the limitations on its authority specifically set forth in 28 U.S.C. § 2254(d). From a reading of the court's order, it is clear that the court could not have even implicitly relied on paragraphs 1 through 7 of section 2254(d) in reaching its decision to affirm the district court. Moreover, it is impossible to tell whether the court relied on paragraph 8 in that its order gives no indication that section 2254(d) was even considered.

This case requires application of the corrective process which only the grant of the petition for writ of certiorari can now provide. The Seventh Circuit has ignored the reliability of the fact finding process of the Illinois courts and has not used the facts so found to determine whether the alleged constitutional errors were harmless beyond a reasonable doubt.

Petitioners maintain that the findings of fact were sufficient to establish beyond a reasonable doubt that the alleged errors were harmless. *Chapman v. California*, 386 U.S. 18, 24 (1967). In deciding the issue of harmless error,

the federal courts may give different weight to the facts as found by the state court and may reach a different conclusion upon consideration of the legal standard, but the questions of fact that underlie this ultimate conclusion are governed by the statutory presumption of 28 U.S.C. § 2254(d). Whether respondent was recorded by the video equipment at Guerrero's residence is a question of fact as to which the statutory presumption applies. Thus, the court of appeals failed to afford the requisite presumption of correctness to the state court findings in applying the doctrine of harmless error to the alleged errors.

As the court completely failed to state with any specificity the reasons upon which to predicate their refusal to accord the presumption of correctness to the express state court findings or to even acknowledge such requirement, further review is warranted so as to evaluate the extent to which compliance with the requirement of 28 U.S.C. § 2254(d) is required. Had the court of appeals applied the presumption of correctness to the findings of fact which conclusively established respondent was at Guerrero's residence at the time of the sale of cocaine, the court would have necessarily found that the error was harmless beyond a reasonable doubt. *Rushen v. Spain*, ____ U.S. ____, ____, 104 S.Ct. 453, 457 (1983). Based upon a finding of fact that respondent was filmed on videotape a more compelling case of guilt would be difficult to imagine.

As in *Sumner v. Mata*, this case presents an important question regarding the role to be played by the federal courts in the exercise of habeas corpus jurisdiction. By the decision of the court of appeals it is clear the court failed to accept this Court's leadership in the area of federal-state relations.

A writ issued upon the application of a state prisoner under 28 U.S.C. § 2254 in effect overturns either the factual or legal conclusion reached by the state-court system under whose judgment the prisoner stands convicted. Adherence to the requirements of 28 U.S.C. § 2254(d) will ensure that the writ will only issue when that result is ultimately required. However, this Court is only left to guess as to the reasons for granting habeas corpus relief where the Seventh Circuit neither applied the presumption of correctness nor explained why it had not notwithstanding the provisions of section 2254(d). By its decision, the Seventh Circuit affirmed the district court's findings of fact as to the identity of the seller of cocaine even though they were at odds with the findings made by the Illinois appellate court. Consequently, the court reached a conclusion that the alleged constitutional errors were not harmless beyond a reasonable doubt and did so on the basis of fact findings that were clearly in conflict with those made by the Illinois appellate court. For this Court to allow the decision of the court of appeals to stand would deprive the statutory presumption of correctness of any significance in habeas corpus litigation.

CONCLUSION

For the above-advanced reasons, a writ of certiorari should issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

[UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 35]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued December 7, 1984

January 14, 1985.

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. ROBERT A. GRANT, *Senior District Judge**

UNITED STATES OF AMERICA ex rel. ALAN D. ROBINSON,
Petitioner-Appellee,

No. 84-2515 vs.

KENNETH MCGINNIS and NEIL F. HARTIGAN,
Respondents-Appellants.

Appeal from the District Court
for the Central District of Illinois.
Harold A. Baker, Judge.

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* Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

ORDER

The State of Illinois appeals from a decision of the district court for the Central District of Illinois granting a writ of habeas corpus to petitioner Alan D. Robinson. For the reasons set forth below, we AFFIRM the decision of the district court.

The trial court excluded Robinson's alibi defense because it found that Robinson failed to provide the State with specific alibi information within a "reasonable time," as required by the Illinois notice-of-alibi statute, Ill. Rev. Stat. ch. 110A, § 413(d).

The exclusion of Robinson's alibi defense at trial violated his right under the fifth, sixth and fourteenth amendments to testify on his own behalf. There is no evidence that Robinson suppressed his alibi evidence during pretrial discovery to obtain any tactical advantage. Even if the presentation of Robinson's alibi defense was a surprise to the state, the trial court could have granted a continuance to enable the state to investigate the alibi. Preclusion was an appropriate remedy in this case. *Alicea v. Gagnon*, 675 F.2d 913, 924 (7th Cir. 1982). Since there is a reasonable possibility that the trial court's ruling affected the jury's verdict, it cannot be deemed harmless error. *Allison v. Gray*, 603 F.2d 633, 634 (7th Cir. 1979).

Conclusion

The decision granting Robinson a writ of habeas corpus is AFFIRMED, and that he shall be discharged from custody unless retried for these offenses within 120 days herefrom.

APPENDIX B

[Filed August 20, 1984]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES ex rel. ALAN D. ROBINSON,

Petitioner,

No. 83-2433 vs.

KENNETH MCGINNIS, et al.,

Respondents.

ORDER

This matter is before the court on the petitioner's motion for summary judgment. The motion presents two issues: (1) Whether it is constitutionally permissible in a state criminal prosecution for the trial judge to refuse to permit material alibi witnesses to testify because the defense failed to give timely notice of its intended alibi defense, and (2) whether it is constitutionally permissible in a state criminal prosecution for the trial judge to refuse to allow the defendant to testify concerning his whereabouts on the date in question because the defense failed to give timely notice of its intended alibi defense.

I. PROCEDURAL POSTURE

The petitioner, Alan D. Robinson, an inmate at the Logan Correctional Center, filed this action seeking a writ

of habeas corpus pursuant to 28 U.S.C. § 2254. Following a jury trial in the Circuit Court, Ninth Judicial Circuit, Knox County, Illinois, the petitioner was convicted of delivery of more than thirty (30) grams of cocaine in violation of Ill. Rev. Stat. ch. 56½, § 1401(a)(2) (1979). Following his conviction, the plaintiff was sentenced to a term of imprisonment of twenty years.

The petitioner filed an appeal from the judgment of conviction to the Appellate Court of Illinois, Third District. On appeal, the petitioner raised eight separate grounds for reversal. The Appellate Court rejected each of the petitioner's claims and affirmed his conviction. *People v. Robinson*, 104 Ill. App.3d 20, 432 N.E.2d 340 (1982). Subsequently, the petitioner filed this petition for writ of habeas corpus, alleging that he was denied his constitutional right to testify, to present a defense, and to call witnesses on his own behalf. *See* Petition at p. 5.

II. STATEMENT OF FACTS

The relevant facts are as follows: On November 6, 1979, Ronald Guerrero was arrested for selling one-half gram of cocaine. He offered to assist the police in setting up a drug buy with his dealer in return for leniency. On November 13, 1979, the petitioner allegedly delivered cocaine to Guerrero in his home in Galesburg, Illinois, and was filmed on video tape by a camera previously installed by the police with Guerrero's consent. The camera was placed upon a living room shelf pointing towards the kitchen. The film showed a man, allegedly the petitioner, primarily in profile, giving Guerrero a bag in exchange for money. During the transaction, the seller stated that he might be able to get some more cocaine for Guerrero. On December 5, 1979, pursuant to a court order, the

police installed a wire tap on a hotel telephone in Galesburg from which Guerrero called the petitioner three times to try to arrange a purchase of cocaine. The transaction, however, was never completed.

The petitioner was charged with delivery of cocaine on January 8, 1980, but he was not arrested until June of 1980. Subsequently, the petitioner was ordered to file an answer to the State's pre-trial discovery request by August 5, 1980. The petitioner filed no response until 4:00 p.m. on Friday, October 3, at which time he submitted a discovery answer indicating that he would present an alibi defense consisting of evidence that he was in Peoria at the time of the offense and that he would call John Stringer as an alibi witness. The petitioner's trial was scheduled for October 6, 1980, three days after the plaintiff submitted his discovery answer. Immediately prior to trial, defense counsel explained that he had first learned Stringer's name on October 2. He also added that the petitioner had been in a different town, Creve Coeur, the night of the offense, and not in Peoria as previously stated. Defense counsel stated that Stringer was in the courthouse and available to the State for an interview. The trial court, however, granted the State's motion in limine and excluded the alibi defense on the grounds that it was not timely filed and that the State would not have an adequate opportunity to investigate the asserted alibi.

The trial began on Monday, October 6, but was recessed for one week when the petitioner was injured in an automobile accident on October 7, 1980. Late on Friday, October 10, defense counsel filed a motion to reinstate the alibi defense and listed a second witness. The court denied the motion as untimely, and the trial was reconvened on Tuesday, October 14.

III. DISCUSSION

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether summary judgment is proper, a court ordinarily must view the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party. *Rose v. Bridgeport Brass Co.*, 487 F.2d 804, 808 (7th Cir. 1973).

A. Exclusion Of Defendant-Petitioner's Witnesses

Illinois Supreme Court Rule 415(g) grants trial courts the authority to exclude evidence if it is brought to the attention of the trial court that a party has failed to comply with an applicable discovery rule. Ill. Rev. Stat. ch. 110A, § 415(g)(i) (1979).[1] The Illinois Supreme Court held in *People ex rel. Carey v. Strayhorn*, 61 Ill.2d 85, 329 N.E.2d 194 (1975), that the Supreme Court Rules for dis-

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[1] The Illinois notice-of-alibi statute, Ill. Rev. Stat. ch. 110A, § 413(d) provides that:

> Within a reasonable time after the filing of a written motion by the State, defense counsel shall inform the State of any defenses which he intends to make at . . . trial and shall furnish the state with the following material and information within his possession or control:
>
> (i) The names and last known addresses of persons he intends to call as witnesses . . .; and
>
> . . . .
>
> (iii) And if the defendant intends to prove an alibi, specific information as to the place where he maintains he was at the time of the alleged offense.

covery in criminal cases, including Rule 415, apply to the defense of alibi.

It is well-settled that the right of an accused in a criminal trial to present witnesses in his defense is a fundamental right guaranteed by the Sixth Amendment of the United States Constitution and made applicable to the states by the Due Process Clause of the Fourteenth Amendment. *Washington v. Texas*, 388 U.S. 14 (1967); *Chambers v. Mississippi*, 410 U.S. 284 (1973). In the present case, the State trial court precluded the defense from calling alibi witnesses as a discovery sanction. The Illinois Appellate Court affirmed the trial court and stated:

> Whether alibi evidence should be excluded in a particular case is, of course, a matter for the discretion of the trial judge who must weigh all applicable factors in order to reach a just result. Some cases have stated that it was error, in the circumstances there present, to exclude alibi witnesses if the witnesses were disclosed in time for the prosecution to interview them before they testified. However, there are other cases which have held that exclusion of alibi witnesses was an appropriate sanction, justified by the facts and circumstances of those cases. (Citations omitted.)

People v. Robinson, 104 Ill. App.3d at 23.

In *People v. Williams*, 55 Ill. App.3d 752, 370 N.E.2d 1261 (1977), the Illinois Appellate Court reversed the conviction of a defendant for rape and burglary, where all defense witnesses were excluded from testifying because the defense had failed to comply with the discovery procedures in Ill. Rev. Stat. ch. 110, § 415(g) (1971). In *Williams*, defense counsel became involved as counsel for the defendant one week before the trial with the understanding that the case was to be dismissed by the State due to the difficulty the State had in locating the com-

plaining witness. As a result, the defense counsel claimed that he did not know who his witnesses would be. Moreover, the State had included one of the defendant's alibi witnesses on its list of witnesses even though the State did not call that witness to testify. The defense counsel tendered no list of alibi witnesses to the state prior to trial; however, counsel offered to let the State interview all defense witnesses before they testified. *Williams*, 55 Ill. App.3d at 757

In reversing the conviction, the Appellate Court held:

> *Even without the presence of these factors*, we would still hold that the imposition of the particular sanction in the case at bar was an improper exercise of the trial judge's discretion. The exclusion of all the defense witnesses effectively deprived defendant of an opportunity to present a defense. Such a result offends our system's fundamental tenets of due process. We doubt that the Committee, in drafting our Supreme Court rules, intended this particular sanction to be applied where it would result in the complete elimination of an accused's right to present a defense. Rather, the trial judge could have applied a sanction that was not as harsh and would still have promoted the enforcement of our discovery process. (Emphasis supplied.)

55 Ill. App.3d at 757-58.

Likewise, in *People v. Osborne*, 114 Ill. App.3d 433, 451 N.E.2d 1 (1983), the Illinois Appellate Court held that the sanction of excluding testimony of alibi witnesses was extreme and constituted error. In *Osborne*, the defendant was convicted of two counts of forgery and one count of misdemeanor theft. The State's evidence showed that the defendant and three confederates obtained checks belonging to a Dennis Goodwin. Between April 24, 1982, and April 26, 1982, the defendant signed Goodwin's name to

two of the checks and one of his confederates cashed the checks. The proceeds were then divided among the defendant and two of his partners. One partner, Bowen, was the principal witness against the defendant and testified that she had pleaded guilty to attempt theft and had received probation for her part in the offense. Forgery counts against her were dismissed. 114 Ill. App.3d at 434.

Subsequently, informations were filed against Osborne. He was later arraigned, and the cause was set for jury trial. On June 4, 1982, the State filed its motion for discovery. On July 16, 1982, the defendant filed his answer to the State's motion for discovery and in it raised an alibi defense: "2. Defendant did not commit the offenses as charged, and at the time of the alleged offenses, he was at Pierson Construction Company, Quincy, Illinois." 114 Ill. App.3d at 435. The defendant also stated:

> 6. Defendant attaches a copy of his time sheet for employment at Pierson Construction and a copy of his W-4 form is not in possession of defense counsel at this time, but will be provided when that document is received.
>
> 7. Defendant intends to use an alibi defense, namely that he was, at the time of the alleged offense, at the location of Pierson Construction Company near Quincy, Illinois.

114 Ill. App.3d 435.

The defendant's trial began on August 19, 1982. However, it was not until August 16—three days prior to trial—that the defendant filed a supplement to his discovery answer in which he stated that he intended to call as a witness Diane Dade Buckner. At the conclusion of the State's evidence, the prosecutor successfully moved to exclude Buckner as a witness. In ruling to exclude Buckner, the trial judge stated:

> . . . I don't believe that the response to the State's motion for discovery complies with the rule, because they don't give a specific place. They name an employer, but that is all.
>
> Accordingly, I'm going to sustain Mr. Cameron's [State's Attorney] motion to exclude the testimony of Miss Buckner as it relates to accompanying the defendant to the Quincy Soybean Company on the day of April the 26th of 1982.

114 Ill. App.3d at 436.

The Illinois Appellate Court stated that the disclosure of an alibi defense by a defendant "is almost precisely analogous to answering an interrogatory in a civil case. The remedy for an incomplete or evasive answer is well known: an objection to the answer and a motion to make it more definite and certain." 114 Ill. App.3d at 436. Arguing that the purpose of the notice of alibi statute was to avoid vague generalities which would be humanly impossible to investigate, the court continued:

> In the instant case the information furnished delineated *prima facie* a specific location within the knowledge of the defendant and if the State's Attorney found it inadequate, it was his duty to seek clarification. Under Supreme Court Rule 415(b) (87 Ill.2d R. 415(b)) there is a continuing duty to disclose on both parties. We believe there is a corollary duty on both parties to seek clarification of disclosure which they deem inadequate or evasive. In this context the instant case is unlike *People v. Braxton* (1980), 81 Ill. App.3d 808, 401 N.E.2d 1062, and *People v. Short*, (1978), 60 Ill. App.3 640, 337 N.E.2d 389, both cited by the State for its position. In each of those cases the defendant completely failed to notify the State of any asserted alibi prior to trial.

> . . . It is a fundamental right of a defendant to present his theory of the case, no matter how over blown or specious it might appear.

114 Ill. App.3d at 437.

Federal courts have also held that discovery rules similar to the Illinois notice-of-alibi statute cannot be enforced against a noncomplying defendant by precluding testimony. in *Fendler v. Goldsmith*, 728 F.2d 1181 (9th Cir. 1983),[2] the trial court refused to permit the petitioner to call certain defense witnesses because he had not listed their addresses on his pre-trial list. Listing defense witnesses was required by State discovery rules. The court noted that it was unclear whether the Sixth Amendment strictly prohibited witness preclusion as a discovery sanction or rather required an examination of all attendant circumstances. 728 F.2d at 1185-87. Applying a balancing test, the court held that the trial court had committed constitutional error.[3] One of the defendant's witnesses was a key witness on a crucial issue in the case. The court further found that the prosecution would not have been prejudiced by the witness' testimony since the prosecution already had the witness' name and lacked only his address. 728 F.2d at 1189. But assuming *arguendo* that the defendant's noncompliance was willful, the court stated that the preclusion of witnesses was "too high a price to

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[2] *See also United States v. Davis*, 639 F.2d 239 (5th Cir. 1981); *Hackett v. Mulcahy*, 493 F.Supp. 1329 (D.N.J. 1980).

[3] The *Fendler* balancing test begins with a presumption against the exclusion of witnesses and then considers the following factors: (1) was the defendant's failure to comply with the discovery order "willful"; (2) how important was the witness; and (3) was the possible prejudice (to the prosecution) substantial enough to overcome the defendant's Sixth Amendment right to present a defense? 728 F.2d at 1188-90.

pay to exact for failure to comply with discovery orders issued pursuant to general discovery rules." 728 F.2d at 1190.

Finally, in *United States ex rel. Enoch v. Lane*, 581 F. Supp. 423 (N.D. Ill. 1984), a district court held that an Illinois state court denied a defendant convicted of rape and aggravated kidnapping due process and a fair trial by precluding the testimony of a material defense witness whose name had not been included on the pre-trial discovery list. The witness' identity was first learned by defense counsel after the State had rested. The excluded witness, Patricia Griffin, would have testified about an altercation she had observed between the victim of the alleged rape and a man other than the defendant-petitioner which took place on the morning of the alleged rape. In holding that the exclusion of Griffin's testimony was unconstitutional, Judge Marshall reasoned:

> . . . [A]s we have noted, there is no evidence that petitioner willfully withheld Griffin's name from the court or the prosecution. There was no suggestion of prejudice by the prosecution, and nothing indicating that any great delay would have been occasioned had Griffin been permitted to testify . . . though the prosecution was surprised by the mention of Griffin, surprise in itself means nothing; surprise becomes meaningful only where it causes prejudice. There was no showing of prejudice here. Thus, even applying a balancing test, the trial court based its ruling on the showing by the state that was inadequate to overcome the presumption against exclusion of otherwise probative and admissible defense evidence. *See Washington v. Texas*, 388 U.S. at 19, 87 S. Ct. at 1923; *Fendler*, 728 F.2d at 1188. We hold that the state court committed constitutional error in precluding Griffin's testimony. (Citation omitted.)

Enoch, 581 F. Supp. at 432.

In the case at bar, it is the petitioner's position that on October 3, 1980, defense counsel filed his answer to the State's motion for discovery, indicating that petitioner's defense would be "that he could not be proven guilty of the alleged offense beyond a reasonable doubt in that Petitioner was in Peoria, Illinois, at the time of the offense (C. 136)." Petitioner's Memorandum in Support of Summary Judgment Motion, p. 6. The petitioner's discovery answer named three prospective witnesses, including John Stringer.

The trial began on October 6, 1980, and prior to jury selection, defense counsel discussed the alibi defense which he intended to present. (Record 12-13.) At that time, defense counsel states that he had just learned of John Stringer's name on October 2, 1980, and that Stringer was in the courthouse available to the State for an interview. (R. 12.) Counsel also corrected the location of the alibi to show that the petitioner was in Creve Coeur, Illinois, rather than Peoria, Illinois. (R. 12-13.) Counsel represented that the petitioner, himself, would testify as to the alibi defense. (R. 14.) Finally, defense counsel disclosed Stringer's prior conviction in accordance with Illinois Supreme Court Rules.

Defense counsel also stated that Jim Henderson of Canton, Illinois, of whom counsel had just learned that morning, would also testify as to the petitioner's whereabouts on the date in question. (R. 13.) Counsel explained that the petitioner had been seeking these witnesses since August, 1980, but had just recently located them. (R. 17-18.) Despite defense counsel's representations to the court, the State moved to exclude the presentation of alibi testimony on the grounds of untimeliness and the trial court granted the motion. (R. 21.)

The petitioner argues that there is nothing in the record of the proceedings to indicate that the petitioner's failure to give timely notice of his intended alibi defense was "willful and deliberate". The petitioner argues that no such finding was ever made by the trial court in considering whether to permit or to exclude the alibi defense. "In fact, the only finding made was that the notice was 'late' and the defense was excluded. (R. 20-21)." Petitioner's Memorandum, at p. 7. After reviewing the transcript of the petitioner's trial and the supporting documents filed by the parties in this lawsuit, the court concludes that the petitioner's argument is meritorious.

There was no suggestion of prejudice by the prosecution or any indication that great delay would have been occasioned had the petitioner's witnesses been allowed to testify. *Cf. Enoch*, 581 F. Supp. at 432. Moreover, as the petitioner points out, there is nothing in the record of the proceedings to indicate that his failure to give timely notice of his intended alibi defense was "willful and deliberate". In fact, defense counsel represented to the trial court that he had learned the name of one witness on the day before the defense submitted a discovery answer indicating that there would be an alibi defense. Defense counsel learned the identity of a second witness on the morning of the petitioner's trial.

The court concludes that exclusion of the petitioner's witnesses was too sever a punishment for failure to comply with the Illinois notice-of-alibi statute in light of the court's limited inquiry into the petitioner's failure to raise an alibi defense in a timely fashion. *Cf. Fendler*, 728 F.2d at 1190.

The respondents argue that the court should follow a line of cases which upholds the severe sanction of

precluding witnesses from testifying because a party has failed to comply with a discovery rule. The court finds the respondents' argument unpersuasive.

The respondents rely principally on the case of *United States v. Nobles*, 422 U.S. 225 (1975), and *People v. Braxton*, 82 Ill. App.3d 808, 401 N.E.2d 1062 (1980). In *Nobles*, the question presented was whether a federal trial court may compel the defense to reveal the relevant portions of an investigator's report for the prosecution's use in cross-examining him. The *Nobles* court did not pass on the question raised in the case *sub judice*. Consequently, the respondents' reliance on *Nobles* is helpful only inasmuch as it supports the general proposition that failure to comply with discovery requirements *may* serve as a bar to the presentation of evidence in a criminal action. *Cf. Nobles*, 422 U.S. at 229-30.

Regarding *People v. Braxton*, the case at bar is distinguishable on its facts. In *Braxton*, defense counsel sought to amend his discovery answer to assert an alibi defense on the day of trial. Defense counsel sought to include the wife of the defendant as a witness. The trial court refused to allow the defendant to amend his discovery answer to add the alibi defense. The Illinois Appellate Court, in affirming the trial court, commented:

> Here, the defendant waited until the 117th day of his term to notify the State of his alibi defense. The sudden discovery of the alibi and production of his wife as an alibi witness at this late date suggests recent fabrication, particularly in light of the fact that the defendant and his wife were married two days prior to trial. Furthermore, no evidence was produced showing that the defendant was unaware of his alibi defense and the existence of the alibi witness prior to this date. Therefore, the trial judge did not abuse

his discretion in denying the motion to amend the answer to discovery.

81 Ill. App.3d at 815.

In the instant case, defense counsel did not seek to raise an alibi defense on the date of trial; he had indicated that he would present an alibi defense on Friday, October 3, when he submitted his discovery answer. In *Braxton*, however, defense counsel made no mention of an alibi defense until the morning of trial. The *Braxton* court denied the motion to amend the discovery answer because it feared that the alibi defense had been recently fabricated. 81 Ill. App.3d at 815.

The respondents' assertions and arguments notwithstanding, the court is of the opinion that the state trial court's limited findings do not support the conclusion that the petitioner's failure to give timely notice of his intended alibi defense was "willful and deliberate". This court concludes that the trial court committed constitutional error on October 6, 1980, when the petitioner first sought to present his alibi defense and on October 10, 1980, when defense counsel filed a motion to reinstate the alibi defense. The committee which drafted the Illinois Supreme Court Rules did not intend that the petitioner be denied the opportunity to present witnesses in his defense because the identity of those witnesses was not known until the week preceding his trial. Such an application of Illinois Supreme Court Rule 415(g) violates the Sixth Amendment to the United States Constitution.

B. Exclusion Of Defendant's Testimony

In its rulings of October 6, 1980, and October 14, 1980, the trial court in *People v. Robinson*, not only refused to permit material alibi witnesses to testify on behalf of

the defendant but also precluded testimony by the defendant regarding his alibi defense. The court finds that this ruling by the trial court also violated the plaintiff's Sixth Amendment right to testify and to present a defense.

In *Alicea v. Gagnon*, 675 F.2d 913 (7th Cir. 1982), the Seventh Circuit held that it was unconstitutional to prevent a defendant from testifying on his own behalf as a sanction for noncompliance with a state notice-of-alibi rule. In *Alicea*, the defendant failed to notify the prosecution that he intended to raise an alibi defense. At trial, the defendant sought to testify in his defense that he was at home at the time the alleged robbery occurred. The prosecution objected to the admission of this alibi testimony because the trial court had granted the prosecution's motion *in limine* to exclude alibi testimony. The trial court sustained the prosecution's objection and ruled that the petitioner could not testify in his own defense about his alibi because he had failed to give timely notice to the state as required by Wisconsin's notice-of-alibi statute. At trial, however, Alicea did manage to testify that he was at home at the time the crime was committed. He also denied committing the robbery. The jury was not instructed as to his alibi defense, however, and the defendant was convicted.

In ruling that the defendant was entitled to testify in his own behalf, the Court of Appeals applied a balancing test, weighing the competing interests underlying Wisconsin's alibi-notice rule and the constitutional policies favoring the petitioner's right to testify. 675 F.2d at 923. The court stated:

> To be sure, Wisconsin has a legitimate interest in preventing the truly guilty from escaping justice by means of fabricated alibis. But we cannot see how that interest is promoted by precluding a defendant's

> testimony for failure to give notice. The principal reason for notice rules, as we noted at the outset of this opinion, is prevention of surprise to the state, not punishment of the accused for mere technical errors or omissions. In this situation it is difficult to see how the government can claim surprise. . . .
>
> In addition, we do not consider Wisconsin's interest in facilitating the orderly administration of justice sufficiently important to override the accused's right to tell his version of the story. If a defendant takes the stand and denies his presence during the crime, the state can readily rebut his denial on cross-examination by asking the defendants to address the state's evidence. . . .

675 F.2d at 923-24.

In this action, the state cannot claim that it was surprised by the alibi defense. Defense counsel did notify the court and the prosecutor of the intended alibi defense in the discovery answer. Even though defense counsel filed the discovery answer in the week preceding petitioner's trial, it is not unreasonable to expect that the government could have anticipated that the petitioner might testify, particularly since the trial court excluded all of the defense's material witnesses. Additionally, this court does not consider Illinois' interest in facilitating the orderly administration of justice sufficiently important to override the petitioner's fundamental right to tell his own version of the occurrence in question. *Cf. Alicea*, 675 F.2d at 924. The court concludes that the trial court violated the petitioner's Sixth Amendment right to testify when the court refused to permit the petitioner to take the stand and testify concerning his whereabouts at the time of the alleged drug transaction.

C. Harmless Error

In light of the court's holding that the preclusion sanctions as applied to the petitioner violated his constitutional right to testify and to call defense witnesses on his behalf, the court must address the state's argument that the constitutional error was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, *reh. denied*, 386 U.S. 987 (1967). The test is:

> "Whether there is a reasonable possibility" that the error affected the jury's verdict. In answering this question, the court must assess the "probable impact of the [error] on the minds of an average jury." *Allison v. Gray*, 603 F.2d 633, 634 (7th Cir. 1979) (quoting *Chapman*, 386 U.S. at 24, 87 S. Ct. at 828, and *Harrington v. California*, 395 U.S. 250, 254, 89 S. Ct. 1726, 1728, 23 L.Ed.2d 284 (1969)).

Enoch, 581 F. Supp. at 432.

After reviewing the evidence presented at trial and the representations of counsel, this court cannot conclude beyond a reasonable doubt that the state trial court's error was harmless. *Cf. Chapman*, 386 U.S. at 24. Here, the petitioner was charged with the delivery of more than thirty grams of cocaine on January 8, 1980, but he was not arrested until June, 1980. Additionally, the respondents claim that the state video taped a drug buy which shows the petitioner delivering cocaine to a state informant. However, the petitioner's counsel represented to this court, without contradiction, that the jury deliberated for more than eight hours even though it saw the video tape. This court has reviewed the video tape and finds that, standing alone, the tape is not conclusive that Alan D. Robinson is the person shown in the tape. In fact, without corroborating testimony from other witnesses it

would be impossible to conclude that the person seen in the video tape was the petitioner, Alan D. Robinson. Consequently, the court must conclude that there was a reasonable possibility that the trial court's constitutional error affected the jury's verdict. *Cf. Allison v. Gray*, 603 F.2d 633, 634 (7th Cir. 1979).

IV. CONCLUSION

In summary, the court finds that the state trial court committed constitutional error in denying the petitioner's request to present his alibi defense, to call witnesses on his behalf, and to testify in his own defense. The court further finds that the trial court committed error of such significance that habeas corpus should be granted. Consequently, the petitioner's motion for summary judgment is allowed. *See* Fed. R. Civ. P. 56(c). *See also* 28 U.S.C. § 2241(a).

IT IS THEREFORE ORDERED that the petitioner's motion for summary judgment be, and hereby is, allowed.

IT IS FURTHER ORDERED that the petition for a writ of habeas corpus be, and hereby is, allowed.

IT IS FURTHER ORDERED that the petitioner, Alan D. Robinson, be discharged from custody, unless, within one hundred twenty (120) days after the entry of this order, the petitioner is retried for the offenses for which he is currently incarcerated.

ENTER this 20th day of August, 1984.

/s/ Harold A. Baker
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 11, 1985.

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. ROBERT A. GRANT, *Senior District Judge**

UNITED STATES OF AMERICA ex rel. ALAN D. ROBINSON,
Petitioner-Appellee,

No. 84-2515 vs.

KENNETH MCGINNIS,
Respondent-Appellant.

Appeal from the United States District Court
for the Central District of Illinois.
No. 83-2433—**Harold Baker,** Judge.

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* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by respondent-appellant Kenneth McGinnis, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing.

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.